(18)

No. 03-339

FEB 27 2004

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CAREER FOREIGN SERVICE DIPLOMATS IN SUPPORT OF RESPONDENT

DOUGLASS W. CASSEL
Director
CENTER FOR INTERNATIONAL
HUMAN RIGHTS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

THOMAS E. BISHOP
Counsel of Record
HOLLAND & KNIGHT LLP
50 North Laura Street
Suite 3900
Jacksonville, Florida 32202
(904) 353-2000

Counsel for Amici Curiae

186050

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

Contents

Page

VI. ALLOWING USE OF ATCA AGAINST CORPORATIONS ALLEGEDLY INVOLVED IN THE COMMISSION OF HUMAN RIGHTS VIOLATIONS FURTHERS U.S. FOREIGN POLICY 20

CONCLUSON 24

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. ATCA IS CONSISTENT WITH THE U.S. FOREIGN POLICY PRIORITY OF PROMOTING RESPECT FOR INTERNATIONAL HUMAN RIGHTS.	11
II. POTENTIAL CONFLICTS WITH OTHER ASPECTS OF U.S. FOREIGN POLICY DO NOT JUSTIFY DRASTICALLY CURTAILING ATCA.	14
III. THE EXECUTIVE BRANCH HAS SUPPORTED IMPORTANT ATCA CASES.	15
IV. DRASTIC CURTAILMENT OF ATCA IS NOT JUSTIFIED BECAUSE WELL-ESTABLISHED DOCTRINES ALLOW DISMISSAL OF CASES WHICH WOULD HARM U.S. FOREIGN RELATIONS	17
V. ATCA CLAIMS NEED NOT INTERFERE WITH THE WAR AGAINST TERRORISM	19

TABLE OF CITED AUTHORITIES

Cases	Page
Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996)	13
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).	17
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	14, 15, 16
In re Estate of Marcos;, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1993)	13
Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)	13, 16, 17
Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003)	6, 22
Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988)	13, 18
Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1204 (C.D. Cal. 2002)	18
Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995)	13

Cited Authorities

	Page
Statutes	
7 U.S.C.A. § 1733(j)(1)	12
12 U.S.C.A. § 635(6)(D)(1)	12
15 U.S.C. § 78a *et seq.*	23
19 U.S.C.A. § 2434	12
19 U.S.C.A. § 3901	12
22 U.S.C. § 2304(a)(1)	12
28 U.S.C. § 1350	*passim*

INTEREST OF AMICI CURIAE[1]

The purpose of this brief is to bring to this Court's attention the views and experience of career United States diplomats relevant to the arguments made by petitioners and their *amici* about the impact of the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA") on U.S. foreign policy.

Each of the amici curiae has served in the U.S. Foreign Service. Most have served as ambassadors.

Hon. James Akins served in the Foreign Service for 22 years, primarily in the Middle East, including as the U.S. Ambassador to Saudi Arabia during the Nixon Administration (1973-75) and as an attache in the U.S. Embassy in Baghdad (1963-65). He is a respected and highly sought speaker and analyst on the Middle East peace process as well as Arab politics in general.

Hon. Jack R. Binns served in a variety of posts in his 25 years in the Foreign Service, including Director, Northern European Affairs, Political Counselor in the United Kingdom, Deputy Chief of Mission in Costa Rica and Spain, and Ambassador to Honduras. He now resides in Arizona, and is president of the Tucson Committee on Foreign Relations and a visiting scholar at the University of Arizona.

Eugene Bird served in the Foreign Service for 22 years (1952-75), including in Israel, Egypt, Lebanon, Saudi Arabia and India. He worked extensively with chambers

---

1. No counsel for a party authored this brief in whole or in part and no person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of the brief of *amici curiae* and their letters of consent have been lodged with the Court.

of commerce in each of those countries. He was the co-founder of the Indo-U.S. Chamber of Commerce, Trade Adviser to the Northwestern Governors (1975-78), and Vice-President of General Electric overseas, based in the Middle East (1978-82).

Harry C. Blaney III served in the Foreign Service for 25 years, including as a Member of the Secretary of State's Policy Planning Staff and as Director of the Office of Asian Refugee Assistance at the Department of State. He also was a Visiting Fellow at the Council on Foreign Relations and at the Royal Institute of International Affairs and the Woodrow Wilson International Center for Scholars. He served abroad at the U.S. Mission to the European Communities and at the U.S. Mission to NATO.

Larry G. Butcher was a member of the Foreign Service from 1970 until his retirement in 1998 as a Senior Foreign Service officer. He served as a commercial officer in Venezuela and an economic officer in Poland and Portugal. In the Office of Regional Economic Policy in the Bureau of Inter-American Affairs and in five years as Deputy Director (1989-1991) and Director (1993-1997) of the Office of Development Finance, he dealt with issues including human rights concerns and U.S. policy on loans to developing countries.

Suzanne S. Butcher was a member of the Foreign Service for 29 years, serving in Mexico, Venezuela, Poland and Canada. In the Office of Policy and Planning of the Bureau of Inter-American Affairs (1984-86), as Deputy Director of the Office of UN Political Affairs (1989-91), as a member of the Secretary's Policy Planning Council (1993-96), and as Director of the Office of Australia, New Zealand, and Pacific Island Affairs (1996-98), she dealt with the interplay of multiple U.S.

interests. She retired in 1998 as a member of the Senior Foreign Service.

Christian Chapman served in the Foreign Service for 33 years (1950-83), including in Morocco, Lebanon, Iran and Vietnam. He served as chargé d'affaires in Laos and France, and worked for NATO in Washington and Brussels.

Elizabeth Spiro Clark served in the Foreign Service in a variety of capacities including director of the office of democracy promotion in the Bureau of Democracy, Human Rights and Labor from 1995-1998, and the counselor for political affairs in the U.S. embassies in Iceland and Norway. She was a political officer in South Africa in the mid-1980s analyzing internal political developments for the U.S. government and assisting anti-apartheid movements through a congressionally mandated human rights fund. She held assignments in legislative affairs and as a special assistant for Europe and Africa to the Undersecretary for Political Affairs. She has received a number of reporting and other awards. She is currently an associate at the Institute for the Study of Diplomacy at Georgetown University.

Hon. Goodwin Cooke served for 25 years in the Foreign Service, 1956-81, serving in embassies in Pakistan, Yugoslavia, Italy, Belgium, Canada, Ivory Coast, and the Central African Republic, where he was Ambassador. He is now a professor teaching International Relations in the Maxwell School at Syracuse University.

Hon. Carleton S. Coon, Jr. served in the Foreign Service for 35 years, including as Ambassador to Nepal (1981-84).

Hon. John Gunther Dean served as Ambassador to Cambodia (1974), Denmark (1975-1978), Lebanon (1978), Thailand (1981), and India (1985-1988). He was also Deputy for Civil Operations for Rural Development Support in Military Region 1 in Vietnam with the assimilated rank of Major General, and presented credentials as Charge d'Affaires in Mali. He is currently a member of academic and corporate boards in the United States, Europe and Asia.

Hon. Willard Ames De Pree served in the Foreign Service from 1956 to 1993. His overseas assignments included tours as Ambassador to Mozambique (1976-1980) and Bangladesh (1987-1990). In the State Department he served as Director of Management Operations, a member of the Policy Planning Staff and a Senior Inspector.

Hon. John Ferch served in the Foreign Service for 31 years. He entered the Foreign Service in 1958, serving in a variety of postings including economics officer in Colombia (1964-67), principal officer in Dominican Republic (1967-69), chief of the economic sections in El Salvador (1969-71) and Guatemala (1971-75), director, Office of Food Policies and Programs (1975-78), Chief of the U.S. Interest Section in Cuba (1982-1985) and Ambassador to Honduras (1985-86). In previous assignments he specialized in economic and American business matters. After the Foreign Service he was National Intelligence Officer for Economics at the Central Intelligence Agency and then Director of the Office of Foreign Relations at the Department of Labor.

F. Allen "Tex" Harris served for 35 years as a career Foreign Service Officer in a variety of postings including Political Officer in Caracas, Venezuela and Buenos Aires,

Argentina, Special Assistant to the Legal Advisor, Deputy Director of Southern Africa, Director of the SALT Working Group, Director of Public Programs, Director of Emergency Operations, Director of African Regional Affairs, Consul General in Durban, South Africa and Melbourne, Australia, Associate Administrator of the EPA for International Activities, and twice President of the American Foreign Service Association. He is also the recipient of the Department's Distinguished Honor Award for reporting on human rights violations in Argentina during the "dirty war" period. He retired in 1999, resides in Virginia and is currently a lecturer on foreign affairs and the Secretary of the American Foreign Service Association.

Hon. Robert V. Keeley spent 34 years as a career Foreign Service Officer, including in Jordan, Mali, and Greece, as Deputy Chief of Mission in Uganda and Cambodia, and as Ambassador to Mauritius, Zimbabwe, and Greece. He served as Deputy Assistant Secretary of State for Africa, and as Deputy Director of the Interagency Task Force for the Indochina Refugees. He retired in 1989 and served as President of the Middle East Institute in Washington from 1990 to 1995.

Brady Kiesling served as a Foreign Service Officer for 20 years, including in Israel, Morocco, Greece, and Armenia. His last position was as Political Counselor at the U.S. Embassy in Athens, where he had also served previously as human rights officer.

Hon. David Korn served in the Foreign Service for 32 years (1956-82), mostly in the middle East. He was the Ambassador to Togo (1986-88) and Permanent Chief of Mission to Ethiopia (1982-85, during which years the U.S. did not have an Ambassador to Ethiopia).

Hon. Princeton Lyman is the Ralphe Bunche Senior Fellow and Director of Africa Policy Studies at the Council on Foreign Relations. He was Assistant Secretary of State for International Organizations (1996-98), Ambassador to South Africa during that country's transition from apartheid to democracy (1992-95), Director of the State Department's Bureau for Refugee Programs (1989-92), and U.S. Ambassador to Nigeria (1986-89). In all, he served for over three decades in the U.S. Department of State and U.S. Agency for International Development. After completing his Foreign Service career, he was a senior fellow at the United States Institute of Peace (1999-2000) and Director of the Global Interdependence Initiative at the Aspen Institute (2000-03).

Hon. Richard Cavins Matheron served in the Foreign Service for 37 years (1949-1986), including as the U.S. Ambassador to Swaziland (1979-82).

Hon. John W. McDonald, lawyer and diplomat, spent twenty years of his career in Western Europe and the Middle East. From 1947-1974, Ambassador McDonald held various State Department assignments in Berlin, Frankfurt, Bonn, Paris, Washington D.C., Ankara, Tehran, Karachi, and Cairo. From 1978-87, he carried out a number of assignments for the State Department including President of the INTELSAT World Conference called to draft a treaty on privileges and immunities, Secretary General of the 27th Colombo Plan Ministerial Meeting, head of the U.S. Delegation which negotiated a UN Treaty Against the Taking of Hostages, and Coordinator for Multilateral Affairs of the State Department's Center for the Study of Foreign Affairs.

Edmund McWilliams served in the Foreign Service for 26 years (1975-2001) in a variety of postings including

Department of State desk officer for Laos/Cambodia and Vietnam, Political Officer in Bangkok and Moscow, Political Counselor in Managua and Jakarta, Acting Deputy Chief of Mission in Kabūl, Special Envoy to Afghanistan and Charge d'Affaires in Bishkek and Dushanbe. He received the Secretary of State's Secretary's Career Achievement Award, four Superior Honor Awards, two Group Superior Honor Awards, two Meritorious Honor Awards and the Christian A. Herter Award (American Foreign Service Association).

Hon. Donald Norland served in the Foreign Service from 1952 to 1981, including three years, 1976-79, concurrently as Ambassador to Botswana, Swaziland and Lesotho. He also served in Morocco (1952-56), Cote d'Ivoire (1958-60), Burkina Faso (1960) and Guinea (capital Conakry) 1970-72) and as Ambassador to Chad (1979-81). From 1987 to 1989, Ambassador Norland chaired the African Studies Program at the Foreign Service Institute, the State Department's in-house training center. His private sector experience includes Program Director at the Center for International Private Enterprise at the U.S. Chamber of Commerce, President of the WorldSpace Foundation and as a founding member of the Governing Boards of the New Africa Fund and the National Summit on Africa.

Hon. Edward L. Peck served in the Foreign Service for 32 years, including in Sweden, Morocco, Algeria, Tunisia and Egypt. He was Chief of Mission in Iraq and Mauritania; and Deputy Director of the Reagan White House Task Force on Terrorism. He was an army paratrooper who saw two tours of active duty, and is a Fellow of the Institute of Higher Defense Studies, National Defense University.

Hon. Jack R. Perry was a career Foreign Service Officer from 1959 to 1983, serving in Moscow, NATO, Paris, Prague, Stockholm and as Ambassador to Bulgaria 1979-81. After retirement he taught at The Citadel, Charleston, S.C., for three years, and from 1985 to 1995 was the director of the Dean Rusk Program in International Studies at Davidson College in Davidson, North Carolina, where he still resides.

William A. Root was employed by the Department of State from 1950 to 1983, most of that time as a Foreign Service Officer. He served in Bonn, Copenhagen, Saigon, Berlin, as well as Washington, D.C. He was Director of the Office of East-West Trade from 1976 to 1983.

Hon. Ronald I. Spiers served in the Foreign Service for 38 years (1954-92), including as Ambassador to the Commonwealth of the Bahamas (1973-74), Turkey (1977-80) and Pakistan (1981-83). He was Director of NATO affairs (1964-66), Assistant Secretary of State for Political-Military Affairs (1969-1973), Assistant Secretary of State for Intelligence & Research (1980-81), and Under-Secretary of State for Management (1983-89). Recipient of two Presidential Distinguished Executive Service Awards, he was accorded the personal rank of Career Ambassador by President Reagan and the U.S. Senate in 1984. In 1989, Ambassador Spiers was nominated by President Bush and appointed by UN Secretary General Perez de Cuellar as Under Secretary General of the UN for Political Affairs, making him the most senior American in the UN Secretariat, responsible for General Assembly affairs and for coordinating implementation of UN resolutions after the Gulf war. He retired from the UN in March 1992.

Hon. Robert White began his 25 year Foreign Service career in 1955. Among the posts he held were Latin America Director of the Peace Corps, Deputy Permanent Representative to the Organization of American States, Ambassador to Paraguay, and Ambassador to El Salvador. After retiring from the Foreign Service in 1981, he served as a Senior Associate at the Carnegie Endowment for International Peace and President of the Center for International Policy in 1989.

Robert J. Wozniak served as Counselor for Public Affairs at the U.S. embassies in Greece and Morocco and at the U.S. mission to NATO headquarters in Brussels, and as Public Affairs Officer at the U.S. embassies in Cyprus and Syria from 1970 to 1992.

SUMMARY OF ARGUMENT

Eliminating, or drastically curtailing, ATCA lawsuits is not justified by concerns over any overall negative impacts that the statute has on foreign policy. On the contrary, eviscerating ATCA could undermine U.S. foreign policy objectives.

The United States has long been regarded as a world leader in its commitment to international human rights standards and respect for the rule of law. This is one of our greatest assets in our diplomatic relations. Our commitment to the rule of law and to the punishment of those who commit gross violations of human rights standards has been a hallmark of our foreign policy. The credibility of that commitment will be undermined if we eliminate ATCA lawsuits, which are a highly visible tool to hold accountable persons who commit heinous acts such as genocide, crimes against humanity, war crimes, rape and torture.

U.S. foreign policy has many facets. Even where we criticize another government for its human rights practices, or where an ATCA claim is brought against one of its citizens or against a corporation doing business in that country, rarely do such actions have a significant adverse impact on our foreign relations. All of us have diplomatic experience in countries where we have engaged in such criticism, or concerning which ATCA claims have been brought. Yet bilateral diplomatic relations have continued, U.S. companies have continued to invest, and those countries have continued to cooperate on matters of mutual interest such as the war against terrorism.

U.S. trade and investment policy do not necessarily contradict our human rights policy. Our government has spoken clearly about the need to ensure that U.S. corporate entities comply with international human rights obligations. Similarly, in our war against terrorism, our policy is to maintain our commitment to human rights norms and the rule of law.

There may, of course, be particular cases where a claim under ATCA may be counterproductive to overall U.S. foreign policy goals, including the promotion and protection of human rights. However, in such cases the State Department is able to make its views clear. It has done so repeatedly. We have confidence in the capacity of the courts to weigh these considerations on a case-by-case basis and to dismiss cases where warranted.

ARGUMENT

I. ATCA IS CONSISTENT WITH THE U.S. FOREIGN POLICY PRIORITY OF PROMOTING RESPECT FOR INTERNATIONAL HUMAN RIGHTS.

The present Administration has described the central tenet of American foreign policy over the past 200 years as a "distinctly American internationalism that reflects the union of our values and our national interests."[2] The National Security Council continued, "in pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere. . . . We will speak out honestly about violations of the nonnegotiable demands of human dignity."

The commitment to these "nonnegotiable demands of human dignity" is reflected in many aspects of U.S. policy. For nearly 30 years, this country has issued "Country Reports" on human rights practices. The State Department's Country Reports are unilateral mechanisms that became part of U.S. foreign policy under the Nixon Administration through an amendment to the Foreign Assistance Act of 1973.[3] These reports are a widely cited authority on human rights practices around the world.

---

2. National Security Strategy of the United States of America (September 2002) available at *http://www.whitehouse.gov/nsc/nss.html*.

3. Michael E. Parmly, Acting Assistant Secretary of State, Bureau of Democracy, Human Rights, and Labor, Introduction: IV. History of the Human Rights Reports, U.S. Department of State Human Rights Report for 2000 available at http://www.state.gov/g/drl/rls/hrrpt/2000/648pf.htm; 22 U.S.C. § 2151n.

Our country conditions foreign aid on respect for human rights. Section 502B of the Foreign Assistance Act of 1961, which was adopted in 1974, declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[4]

Numerous U.S. laws accordingly condition foreign development, security and investment assistance and trade benefits on compliance with internationally recognized human rights.[5]

---

4. 22 U.S.C. § 2304(a)(1).

5. *See, e.g.*, 7 U.S.C.A. § 1733(j)(1) (the United States "shall not enter into any agreement under this chapter to provide agricultural commodities . . . to the government of any country determined by the President to engage in a consistent pattern of gross violations of internationally recognized human rights"); 12 U.S.C.A. § 635(6)(D)(1) (The Export-Import Bank of the United States

> shall not give approval to guarantee or insure a sale of defense articles or services unless . . . the President determines . . . that the purchasing country has complied with all restrictions imposed by the United States on the end use of any defense articles or services . . . and has not used any such defense articles or services to engage in a consistent pattern of gross violations of internationally recognized human rights . . .

19 U.S.C.A. § 2434 (extending normal trade relations to former "Marxist-Leninist" countries that now comply with international human rights norms); 19 U.S.C.A. § 3901 (finding that U.S. implementation of sanctions on conflict diamonds was related to the human rights violations committed in Sierra Leone, Angola, and the Democratic Republic of Congo).

ATCA is one of the tools of the United States' overall efforts to promote compliance by government officials and private actors with fundamental standards of international human rights. U.S. courts have allowed cases to proceed only for the most serious of human rights violations involving gross physical abuse. Their rulings have been limited to violations such as torture, summary execution, genocide, war crimes, arbitrary detention, and disappearances.[6] These abuses have been widely condemned internationally and by U.S. foreign policy for decades. Particular ATCA cases, such as those against Bosnian Serb leader Radovan Karadzic, can serve to reinforce other aspects of U.S. foreign policy.[7]

By causing other nations to question our commitment to the enforcement of human rights standards, an effective elimination or evisceration of ATCA could undermine American foreign policy.

---

6. *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (disappearances, summary execution, torture and cruel, inhuman or degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide and war crimes); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1993) (torture, execution, and disappearance); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture).

7. Even critics of ATCA state that these cases have helped bring about important resolutions for human rights victims. For example, victims' lawsuits helped to make possible the historic agreement the United States forged in 2000 with the German government and companies to compensate Holocaust-era slave laborers. After negotiating that agreement, then Deputy Secretary of the Treasury Stuart Eizenstat said: "It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. . . . Without question, we would not be here without them." Remarks of Deputy Secretary of the Treasury Stuart E. Eizenstat at the 12th and Concluding Plenary on the German Foundation, LS-774 (July 17, 2000) available at http://www.ustreas.gov/press/releases/ls774.htm.

II. POTENTIAL CONFLICTS WITH OTHER ASPECTS OF U.S. FOREIGN POLICY DO NOT JUSTIFY DRASTICALLY CURTAILING ATCA.

ATCA was enacted "as part of an articulated scheme of federal control over external affairs . . . where principles of international law are in issue," and was designed to respond to "[t]he Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world."[8]

Cases brought in the United States by private parties need not limit the ability of the Executive Branch to engage with foreign governments. Other governments generally understand that private lawsuits are not U.S. government actions.

Other governments do on occasion object to aspects of our legal system. As diplomats it was our role to explain U.S. policy to the world, including how our government functions and our constitutional separation of powers. It fell to us to explain what may sometimes seem to other countries to be incomprehensible requirements of the U.S. legal system. National legal systems differ and at times conflict. Our task was to promote resolution of such disputes, which often arise from mutual misunderstanding. Mere differences in enforcement systems cannot by themselves justify eliminating a valuable means of human rights enforcement. In any event, ATCA has not caused any greater conflict than other laws to which some foreign nations may object.

8. *Filartiga v. Pena Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

III. THE EXECUTIVE BRANCH HAS SUPPORTED IMPORTANT ATCA CASES.

Our experience as diplomats leads us to concur in the support for prudent application of ATCA expressed by the State Department to federal courts in leading human rights cases.

In a joint *amicus* brief in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the State and Justice Departments successfully urged the U.S. Court of Appeals for the Second Circuit to apply international law norms under ATCA. "Such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."[9]

They emphasized, moreover, that to fail to recognize a right of action by a victim of an accepted international human rights norm could harm U.S. foreign relations:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . .When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might

9. Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 603 (1980) (citations omitted).

> seriously damage the credibility of our nation's commitment to the protection of human rights.[10]

Similarly, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the State Department Legal Adviser and the Solicitor General urged the Second Circuit to vacate and remand the jurisdictional dismissal of an ATCA suit against a nongovernmental actor. They argued that the lower court should have engaged in "a rigorous analysis of a range of factors in order to determine whether an action can be pursued under the Alien Tort Statute for a violation of the law of nations."[11] Their brief suggested that, as long as courts engage in such a rigorous analysis, separation of powers concerns need not arise.[12]

In 1992, the Torture Victim Protection Act ("TVPA"),[13] which expanded the possibility for suits in U.S. courts for violations of international human rights law, was enacted into law. In signing the TVPA into law, President George Bush acknowledged the "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries," but explained:

> These potential dangers, however, do not concern the fundamental goals that this legislation seeks

10. *Id.* at 604.

11. Brief of United States as Amicus Curiae at 2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

12. *See id.* at 1 (finding "no merit to the suggestion . . . that the justiciability of these cases is in doubt . . . because of the theoretical possibility" that "[the defendant] Karadzic might some day be recognized by the Executive Branch as a head of state.").

13. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

> to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.[14]

IV. DRASTIC CURTAILMENT OF ATCA IS NOT JUSTIFIED BECAUSE WELL-ESTABLISHED DOCTRINES ALLOW DISMISSAL OF CASES WHICH WOULD HARM U.S. FOREIGN RELATIONS.

There are times when a case brought under the Alien Tort Claims Act may damage U.S. foreign policy interests, including the promotion and protection of human rights. But U.S. courts have shown themselves to be respectful of these ramifications. We understand that there are a number of doctrines which federal courts have at their disposal, and which they have used to dispose of cases that are harmful to U.S. foreign policy.[15] These tools can effectively limit the

14. Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

15. The "preferable approach" to analyzing justiciability under ATCA "is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in Section 1350, without compromising the primacy of the political branches in foreign affairs." *Kadic*, 70 F.3d at 249. Among other doctrinal tools, the "act of state doctrine" precludes courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory" in the "absence of a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 421 (1964). Other tools include sovereign immunity under the Foreign Sovereign Immunities Act, and venue under the doctrine of *forum non conveniens*.

harm individual ATCA cases may cause and provide a further reason why the effective repeal of ATCA is not justified.

Courts may ask the U.S. State Department for its views on whether the Court should refrain from ruling on a case due to foreign policy considerations. We understand that this is a common practice in ATCA cases. As in the *Filartiga* and *Kadic* cases discussed above, the State Department has at times stated that there would be no negative foreign policy implications if the case were to continue.

On other occasions the concerns of the State Department have persuaded courts to dismiss claims brought under ATCA.[16]

Foreign governments also may express their views about existing lawsuits and U.S. courts have seriously considered these views.[17]

In short, drastic curtailment of ATCA is unnecessary to prevent unwarranted effects on foreign policy. The lower courts have applied the numerous means at their disposal on a case-by-case basis, allowing ATCA suits to proceed where warranted, while dismissing cases that would intrude into the political branches' management of foreign relations.

---

16. For example, in *Sarei v. Rio Tinto*, the court dismissed human rights claims after the U.S. government opined that adjudication would interfere with an ongoing peace process in Bougainville. 221 F. Supp. 2d 1116, 1178-1200 (C.D. Cal. 2002). In *Saltany v. Reagan*, the court dismissed claims against the United Kingdom alleging that nation was complicit in a purportedly illegal United States attack on Libya. 702 F. Supp. 319, (D.D.C. 1988).

17. *See, e.g., Sarei v. Rio Tinto*, 221 F. Supp. at 1204-1205.

V. ATCA CLAIMS NEED NOT INTERFERE WITH THE WAR AGAINST TERRORISM.

There is no general, negative relationship between ATCA cases and the war against terrorism. Our collective experience has not indicated that countries are less likely to participate in an important collective goal because of claims pursued by individual litigants in U.S. courts.

Indeed, if there is any general relationship between ATCA and the war on terrorism, it is a positive one. An effective war against terrorism is dependent on building international respect for human rights standards and the rule of law. The United States must demonstrate its own commitment to holding accountable those who violate human rights.

President George W. Bush said in his 2002 State of the Union address: "We have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace . . . America will always stand firm for the non-negotiable demands of human dignity: [including] the rule of law [and] limits on the power of the state . . ."[18]

In a speech to the Heritage Foundation on October 31, 2001, Lorne W. Craner, Assistant Secretary for Democracy, Human Rights and Labor, stated that "maintaining the focus on human rights and democracy worldwide is an integral part of our response to the attack and is even more essential today than before September 11. They remain in our interest in promoting a stable and democratic world."[19]

---

18. President Bush's address is available at http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.

19. Remarks of Lorne W. Craner, Assistant Secretary for Democracy, Human Rights, and Labor to the Heritage Foundation (Oct. 31, 2001) available at *http://www.state.gov/g/drl/rls/rm/2001/6378.htm*.

Mr. Craner continued:

> As Dr. Condoleeza Rice said only a week after the horrific attack on September 11, 2001, 'We are not going to stop talking about the things that matter to us, human rights, religious freedom and so forth and so on. We're going to press those things; we would not be American if we did not.'[20]

Eliminating or eviscerating a statute such as the Alien Tort Claims Act which furthers accountability for those who commit acts of violence would thus undercut U.S. credibility in our critical war against terrorism.

VI. ALLOWING USE OF ATCA AGAINST CORPORATIONS ALLEGEDLY INVOLVED IN THE COMMISSION OF HUMAN RIGHTS VIOLATIONS FURTHERS U.S. FOREIGN POLICY.

The petitioners and their *amici* assert that ATCA cases harm U.S. investment and trade policy.[21] These assertions overlook another core United States interest: namely, ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad. When U.S. companies operate overseas, their actions reflect upon the United States as a whole. Our standing as a world leader and our commitment to human rights are diminished if we allow our citizens, including our corporate citizens, to commit human rights violations with impunity.

---

20. *Id.*

21. *See e.g.*, Brief for Petitioner at 36 (ATCA will "undermine the ability of the political branches to use economic leverage to advance policy goals"); Brief for the National Foreign Trade Council, *et al.* as Amici Curiae in Support of Petitioner, at 4.

Not long ago the United States State Department, together with the United Kingdom, established the *Voluntary Principles on Security and Human Rights*, which provide guidelines for companies in the extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[22]

In announcing those principles, the Secretary of State noted that they "demonstrat[e] that the best-run [oil and mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs and standards there is no necessary conflict between profit and principle."[23]

The then Assistant Secretary for Economic and Business Affairs (who continues to serve in that position) elaborated:

> We are committed to advancing America's international economic engagement consistent with the principles of good governance. These principles are vital to our own economic security here at home and are the only sustainable way for United States companies to engage abroad. It is, after all, a fact of business life that companies want to do business in places where the rule of law prevails, where contracts and laws are enforced, where the customs agents work honestly and expeditiously, where the judiciary is fair

---

22. Voluntary Principles on Security and Human Rights, United States Department of State (Dec. 19, 2000) at 1.

23. Remarks of Secretary of State Madeleine K. Albright, Press Briefing, (December 20, 2000), Washington, D.C., available at *http://secretary.state.gov/www/statements/2000/001220.html*.

> and effective, and where human rights are respected. . . . [I]t is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible. . . . *More comprehensive risk assessments, guidance on interactions between companies and host government security, and best security practices are central to any investment climate.*[24]

Some *amici* argue that "abusive ATS litigation ultimately deters investment" by U.S. businesses.[25] While their speculation could prove to be accurate in particular cases, our experience has not shown ATCA litigation over the past 20 years to have had this effect: The U.S. courts have not allowed "abusive" litigation, the number of lawsuits to date has been small and businesses have continued to invest overseas. Our understanding is that a corporation may be held liable only if it provided direct and substantial assistance in the commission of a human rights violation.[26] ATCA helps ensure that multinational corporations complicit in gross violations of international and U.S. law will not enjoy impunity.

---

24. E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State (December 20, 2000) available at *http://www.state.gov/www/policy_remarks/2000/ 001220_wayne_principles.html* (emphasis added).

25. Amici Curiae Brief of National Foreign Trade Council, *et al.* at 12.

26. *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 323-324 (S.D.N.Y. 2003).

Another argument presented by Petitioners' *amici* is that it is unfair to penalize U.S. corporations when the practices of foreign companies may be worse.[27] But ATCA cases have been allowed only where there is evidence that corporations directly assist in violations of fundamental international human rights norms. These cases set a modest and reasonable standard for U.S. businesses to meet.

The fact that some foreign companies might be better positioned to win foreign contracts by engaging in abuses was also an argument advanced against U.S. laws prohibiting bribery and corruption. Yet the U.S. Foreign Corrupt Practices Act of 1977 prohibits U.S. companies from winning foreign contracts by engaging in bribery or corruption.[28] We are not aware that any American court has declined to adjudicate American corporate compliance with those legal standards.

Similarly, the fact that some foreign companies might win foreign contracts from U.S. bidders by engaging in security practices that may include torture and murder, which are equally forbidden to U.S. companies, is hardly sufficient reason for an American court to decline to adjudicate claims that American corporate practices violate international legal standards that forbid gross human rights abuses.

---

27. Brief of Amici National Foreign Trade Council, *et al.* at 12.

28. 15 U.S.C. § 78a *et seq.*

CONCLUSION

Our experience as diplomats for the United States leads us to conclude that the Alien Tort Claims Act is consistent with U.S. foreign policy goals. Where a conflict arises between claims brought in a particular ATCA case and other U.S. foreign policy goals, the U.S. courts have shown that they can effectively address these conflicts. We urge this Court to reject the challenges to ATCA made by petitioners and their *amici*.

Respectfully submitted,

THOMAS E. BISHOP
Counsel of Record
HOLLAND & KNIGHT LLP
50 North Laura Street
Suite 3900
Jacksonville, Florida 32202
(904) 353-2000

DOUGLASS W. CASSEL
Director
CENTER FOR INTERNATIONAL
HUMAN RIGHTS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

Counsel for Amici Curiae